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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 235

EARL B. SPURR

v.

STASIA SPURR

BRIEF FOR STASIA SPURR OPPOSING GRANTING CERTIORARI

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No Federal Question has been considered, nor decided, by the Supreme Court of Appeals of Virginia, so the Supreme Court of the United States should refuse certiorari.

This case was tried on evidence taken *"ore tenus"* (orally by the living voice) in the Circuit Court of the City of Norfolk, on November 4, 1944, and by decree of that date, expressly showing the evidence was *"ore tenus"*, decided in favor of Stasia Spurr. See printed record, pages 37 (bottom) and 38 (top); the decree as to this reading:

"This cause having duly matured upon process served upon the defendant in person, came on this day to be heard upon the bill, answer, general replication,

AND EVIDENCE TAKEN ORE TENUS after proper notice, and was argued by counsel." (Capitals added).

Under the law of Virginia, where an appeal is applied for, the oral evidence has to be put into the record by bill of exceptions or certificate of exceptions within sixty days after the decree or judgment, otherwise the record is so defective that the Supreme Court of Appeals will refuse an appeal, as was done in the present case.

In the present case, the *ore tenus* evidence was never put into tne record, Earl B. Spurr applied for appeal to the Supreme Court of Appeals of Virginia, and that court refused his appeal, wholly and solely because the record did not contain the *ore tenus* evidence, and was insufficient under the law of the *State of Virginia,* to be considered on appeal; and the appeal being refused, the effect was to leave the decree of the Circuit Court in force.

In refusing the appeal, and not considering at all any Federal Question, or any question save that the record did not conform to Virginia State law, the Supreme Court of Appeals entered a definite order April 25, 1945, reading (Printed record, p. 39):

"The petition of Earl B. Spurr for an appeal from and supersedeas to a decree entered by the Circuit Court of the City of Norfolk on the 4th day of November, 1944, in a certain chancery cause then therein depending wherein Stasia Spurr was plaintiff and the said petitioner was defendant, having been maturely considered and a transcript of the record of the decree

aforesaid seen and inspected, the court being of opinion that the *said record is insufficient because it was not made up and certified in accordance with the requirements of the law of this State, doth reject said petition and refuse said appeal and supersedeas,* the effect of which is to affirm the decree of the said circuit court." (Italics added).

As the Supreme Court of Appeals of Virginia based its order refusing appeal on a point of *State law,* it is obvious that the certiorari now asked should be refused, and we hesitate to cite authority for a matter so often decided. However, we will cite two recent cases decided by the Supreme Court of the United States.

In *Copperweld Steel Co.* v. *Industrial Commission of Ohio,* decided April 23, 1945, (U. S. Sup. Ct. Law Ed. Advance Opinions Vol. 89, p. 928, 930), it is said:

"In as much as we conclude that decision was grounded upon the view that the appellant had not pursued the remedy afforded by *state law* for the vindication of any constitutional right it claimed was violated, we must dismiss the appeal, and deny certiorari." (Italics added).

And in *Congress of Industrial Organizations v. McAdory,* decided June 11, 1945 (U. S. Sup. Ct. Law Ed. Advance Opinions, Vol. 89, p 1283, 1287), the opinion states:

"Since the State Supreme Court did not pass on the question now urged, and since it does not appear

to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here."

To doubly demonstrate that the decision of the Supreme Court of Appeals of Virginia in refusing the appeal was based purely on Virginia State Law, we have printed herewith at the end of this present brief, as part hereof, a copy of the brief which was filed for Stasia Spurr in that Court in opposition to granting an appeal in that Court.

We respectfully submit that certiorari should be refused.

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Western Union Building, Norfolk, Va.
Attorney for Stasia Spurr.

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND

EARL B. SPURR
v.
STASIA SPURR

BRIEF IN OPPOSITION TO GRANTING APPEAL

The petition for appeal, page 1, says the final decree complained of was entered *March* 4, 1944; and if that were correct, it would be far too old a decree to appeal from under the four months statute; but that is wrong; the true date of the decree in question being November 4, 1944.

At this stage of the proceedings, it is unnecessary to inquire into the merits of the controversy, either as to facts or law, so we shall not take the time of the Court in demonstrating how correct was the decree, BECAUSE PETITIONER HAS BROUGHT TO THIS COURT AN INSUFFICIENT RECORD, A MERE DEAD SKELETON, WITH THE SUBSTANCE, HEART AND SOUL OMITTED.

This case was heard on Novemer 4, 1944, on evidence taken before the court *ore tenus,* as expressly shown by the decree of that date, and shown by the petition near bottom of page 3 in copying that decree, to-wit:

"This cause having duly matured upon process served upon the defendant in person, came on this day

to be heard upon the bill, answer, general replication, AND EVIDENCE TAKEN ORE TENUS after proper notice, and was argued by counsel." (Capitals added).

The sixty days for making the evidence part of the record having long since elapsed, petitioner now offers a record *with no evidence* (except some supposed depositions on his own behalf not recognized by the decree, and which may well have been ruled out); and not even pretending to show all the evidence.

This case, therefore, is controlled by a solid line of decisions showing that to award an appeal would be a mere improvident award and not legal.

In *Claud v. Pulley,* 169 Va. 467, in dismissing the appeal as improvidently awarded, this Court said:

"At the threshold of this case we are met with a motion to dismiss it from the docket because a large part of the evidence was taken *ore tenus* in open court before the judge, in chancery, and there is nothing in the form of a certificate or bill of exceptions, signed by him, identifying the evidence or making it a part of the record. That this must be done is made mandatory by section 6252 of the Code, as amended by Acts 1930, ch. 246, and section 6253 of the Code as amended by Acts 1934, ch. 90, and Rule XXIV of this court.

"The fololwing cases are controlling as to this point: *Nethers v. Nethers,* 160 Va. 335, 168 S. E. 428; *Ross Cutter and Silo Co. v. Rutherford,* 157 Va. 674, 685, 161 S. E. 898; *Lawrence & Son, Inc. v. Merkel,* 167 Va. 297, 189 S. E. 162.

"In the case of *Nethers v. Nethers,* supra, it was said: 'In *Ross Cutter and Silo Co. v. Rutherford,* 157 Va. 674, 161 S. E. 898, it was held that testimony introduced *ore tenus* before a chancery court is no more a part of the record than is evidence introduced in a common law case, unless it is reduced to writing and made a part of the record, either by decree duly entered or by crtificate signed by the judge earmarking and identifying it.'"

To the same effect is *Carper v. Nesbitt,* 182 Va. 710, and other authorities therein cited.

The record as presented being null and void, we submit that the appeal should be refused and that the order of refusal should distinctly state that the record does not comply with the requirements of *State* law, so that petitioner cannot claim that the Supreme Court of Appeals of Virginia has passed upon some Federal question.

Respectfully submitted,

JAS. G. MARTIN,

Counsel for Stasia Spurr

Copy mailed counsel for petitioner

March 8, 1945.